JD(SF)-24-10
Riverside, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

2 SISTERS FOOD GROUP, INC.

and Cases 21-CA-38915
21-CA-38932

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 1167

2 SISTERS FOOD GROUP, INC.
Employer

and Case 21-RC-21137

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 1167
Petitioner

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for the General Counsel and for Region 21, respectively.
David Rosenfeld and Ana M. Gallegos, Attys., Weinberg Roger & Rosenfeld, PC,
Alameda and Los Angeles, California, respectively
for the Charging Party/Petitioner.
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for the Respondent/Employer.

DECISION

I. Statement of the Case

LANA H. PARKE, Administrative Law Judge. Pursuant to unfair labor practice charges and timely objections to a representation election of July 17, 2009[1] filed by United Food and Commercial Workers International Union, Local 1167 (the Union), the Regional Director of Region 21 of the National Labor Relations Board (Region 21 and the Board, respectively) issued a Report on Challenged Ballots and Objections in Case 21-RC-21137 and Order Consolidating Cases 21-CA-38915 and 21-CA-38932 and Notice of Hearing (the Report and the

[1] All dates herein are 2009 unless otherwise specified.

Complaint, respectively) on December 14, 2009.[2] The Complaint alleges that 2 Sisters Food Group, Inc. (the Respondent) violated Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act).[3] This consolidated case was tried in Riverside, California on March 1 through 3, 17 through 19, and in Los Angeles, California on March 29, 2010.

II. Issues

1. Did the Respondent violate Section 8(a)(1) of the Act by promulgating and maintaining overbroad rules, including solicitation and distribution rules and a rule waiving employees' right to file charges with the Board, all of which has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights?
2. Did the Respondent violate Sections 8(a)(3) and (1) of the Act by terminating employee Xonia Trespalacios on July 13, 2009?
3. Did the Respondent engage in conduct that affected the results of the representation election held July 17, so as to require the setting aside of the election?

III. Jurisdiction

At all material times, the Respondent, a Delaware corporation, with a facility located in Riverside, California, herein called the facility, has been engaged in the nonretail business of processing and supplying food. During the 12-month period ending September 30, a representative period, the Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at the facility goods valued in excess of $50,000 directly from points outside the State of California. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

IV. Procedural Background

The Union commenced an organizational campaign among the Respondent's employees in 2008. Thereafter, the following sequence of events occurred:

- August 26, 2008 and October 24, 2008, respectively: the Union filed unfair labor practices against the Respondent in Cases 21-CA-38480 and 21-CA-38563 (the 2008 ULP charges).
- February 26: the Region authorized the issuance of a consolidated complaint in the 2008 ULP charges, alleging violations of Sections 8(a)(1) and (3) of the Act, hearing for which was ultimately scheduled for June 10.

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[2] At the hearing the General Counsel amended the Complaint to include an allegation that Fernando Rivera and Luz Ceballos were, at all material times, labor relations consultants to the Respondent and agents within the meaning of § 2(13) of the Act, which was not disputed. At the hearing, the Union withdrew its challenges to the ballots of Sotelo Avila, Angelica Baca, and Roxanne Harris, whereafter challenges were no longer sufficient to affect the results of the election.

[3] In representation cases, an employer is traditionally referred to as "Employer" and the union as "Petitioner." For convenience, 2 Sisters Food Group, Inc. will be referred to throughout as "the Respondent," and United Food and Commercial Workers International Union, Local 1167 as "the Union."

- May 28: the Petitioner filed a representation petition with the Region in Case 21-RC-21137, which was blocked pending disposition of the 2008 ULP charges.
- June 4: the Petitioner executed a request to proceed with the representation election, notwithstanding the blocking charges and the pending unfair labor practice hearing in the 2008 ULP charges.
- June 10: hearing on the 2008 ULP charges commenced before an administrative law judge, continuing on four intermittent days until July 11.
- June 17: the Regional Director approved a Stipulated Election Agreement, setting the election in Case 21-RC-21137 for July 17 in an appropriate unit of the Respondent's employees as follows:

> All full-time and regular part-time production employees, maintenance employees, technical/quality assurance employees, sanitation employees, shipping and receiving employees and plant clerical employees employed by the Employer at its [Riverside] facility …excluding all other employees, temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

- July 15: the Union filed an unfair labor practice charge against the Respondent in Case 21-CA-38915.
- July 17: the Region conducted the representation election in Case 21-RC-21137. The tally of ballots showed that of approximately 186 eligible voters, 66 cast ballots for, and 87 against, the Petitioner.
- July 29: the Union filed an unfair labor practice charge against the Respondent in Case 21-CA-38932.
- September 28: an administrative law judge approved the parties' settlement agreement of the 2008 ULP charges, on which compliance thereafter closed.[4]
- October 28: Consolidated complaint in Cases 21-CA-38915 and 21-CA-38932 issued.
- December 14: the Report and the Complaint issued.

V. Unfair Labor Practice Case

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

[4] Counsel for the Union requested that the hearing transcripts/exhibits and settlement agreement from this hearing be received as evidence of animus and to support certain objections to the election, which request was denied. A CD of the materials is held in the file as a rejected exhibit.

A. Relevant Company Work Rules and Policies

The Respondent operates the following production departments at its facility: shipping and receiving, cooked and breaded processing, red meat, poultry, and home meal replacement (HMR). At all relevant times the following individuals in the following positions were supervisors at the facility within the meaning of §2(11) of the Act:

Tracey Reilly (Ms. Reilly)	Vice President of Operations
Veronica Vega (Ms. Vega)	Poultry Department Supervisor

Fernando Rivera (Mr. Rivera) and Luz Ceballos (Mr. Ceballos) were labor relations consultants to the Respondent and agents within the meaning of §2(13) of the Act. Florinda Avila was a lead employee in the poultry production department.

The Respondent's written Rules of Conduct contained the following relevant rules, violation of which subjected employees to discipline ranging, variously, from written warning through discharge:

> Rule 11: Leaving department or the plant during a working shift without a supervisor's permission.
> Rule 12: Stopping work before shift ends or taking unauthorized breaks.
> Rule 28: Unauthorized soliciting of contributions on [Respondent's] premises.
> Rule 33: Distributing printed matter on [Respondent's] premises without permission.
> Rule 34: Fighting or attempting to provoke a fight on company property.
> Rule 35: Inability or unwillingness to work harmoniously with other employees.[5]

The Arbitration of Disputes provision in the Respondent's written offer of employment, reads:

> Any dispute arising between you and 2 Sisters Food Group Inc, will be resolved by arbitration in accordance with 2 Sisters Food Group Inc, Arbitration Policy, which is included in the Employee Handbook that you will receive. By accepting this offer of employment, you agree to waive your right to a court or jury trial, and you acknowledge that all claims that may be lawfully [resolved] by arbitration will be decided by a neutral arbitrator whose decision will be final and may not be appealed.

The Respondent required prospective employees to sign the following arbitration agreement:

> I agree to submit to binding arbitration all disputes and claims arising out of this application and, in the event that I am hired, all disputes and claims arising out of my employment. This agreement includes every type of dispute that may be lawfully submitted to arbitration, including claims of wrongful discharge, discrimination, harassment, or any injury to my physical, mental or economic interests. This means that a neutral arbitrator, rather than a court or jury, will

[5] First violation of Rules 34 and 35 carries the potential discipline of "Written Warning up to Discharge," which presumably includes discharge as a discretional penalty. As noted by Human Resource Manager, Angie Sandoval (Ms. Sandoval), the Respondent could impose a written warning, a suspension, or discharge for a first violation of Rule 34.

> decide the dispute. As such, I am waiving my right to a court or jury trial. I agree that any arbitration will be conducted in accordance with 2 Sisters Food Group employee handbooks, or the rules of the American Arbitration Association.

With regard to discipline of employee misconduct, the Respondent, in both policy and practice, was committed to interviewing employees accused of misconduct and obtaining an employee's explanation prior to imposition of discipline. In pertinent part, the Respondent's Progressive Discipline Policy stated:

> Prior to imposing any disciplinary action, the Supervisor must determine if there are sufficient reasons to initiate the disciplinary process, and if so, at what level of discipline.
>
> 1. *Adequacy of notice.* The Supervisor must first determine whether the employee was given fair notice of the consequences of the misconduct… Supervisors should not assume that employees learn rules by word of mouth. Supervisors should consider whether communication of the rules was reinforced in policy manuals or employee handbooks.
>
> 2. *Investigate facts.* Supervisors are responsible for investigating each incident as soon as possible. They should obtain all facts, interview available witnesses, and review the information fairly and impartially before initiating disciplinary action. Employees should always be given an opportunity to explain their actions.
>
> 3. *Classify disciplinary violation.* Supervisors must determine if a particular act is a major or minor problem, an isolated incident, or a recurring problem.

B. Discharge of Xonia Trespalacios

Xonia Trespalacios (Ms. Trespalacios) had two periods of employment with the Respondent: October 10, 2007 to December 7, 2007 and April 8, 2008 until July 13 when she was discharged. At the time of her discharge, Ms. Trespalacios worked in the day-shift poultry department. Ms. Trespalacios was known to many coworkers to have an outgoing, demonstrative personality, given to touching people when talking to them.

In May, Ms. Trespalacios became involved in the union campaign at the facility, joining the union organizing committee, participating in committee meetings, and distributing pro-union flyers at the Riverside facility. From May through July 13, Ms. Trespalacios distributed as many as two pro-union flyers per week to day-shift coworkers. Ms. Reilly saw Ms. Trespalacios passing out union leaflets. On one occasion, Ms. Trespalacios, holding a flyer in one hand, placed her other hand on Ms. Reilly's shoulder and walked a short distance with her. Ms. Trespalacios was one of a group of the Respondent's employees pictured on two of the Union's election campaign flyers that were widely distributed in the plant. On July 4, Ms. Trespalacios was present when a coworker asked Mr. Rivera about compensation for the holiday. When Ms. Trespalacios disputed Mr. Rivera's computations, Mr. Rivera said something to the effect that Ms. Trespalacios was always with the Union.

On Thursday, July 9, during a day-shift lunch break in the dining area of the Riverside facility, Ms. Trespalacios interacted with employee Yolanda Flores (Ms. Flores) in the presence of employees Sonia Vicente (Ms. Vicente) and Martha Castillo (Ms. Castillo) (the Trespalacios/Flores interaction). A security camera in the dining area filmed the interaction, the

footage of which the Respondent later copied to a CD (the Trespalacios/Flores CD), which was received into evidence at the hearing. The Trespalacios/Flores CD lacks high-quality clarity and definition and has no audio component. Nonetheless, the CD shows the following:

> Ms. Trespalacios stops by a table at the far end of the dining area where Ms. Vicente, Ms. Castillo, and Ms. Flores are seated. While standing next to the seated Ms. Flores, Ms. Trespalacios touches her on the shoulder multiple times with patting motions and then delivers four firmer touches or nudges to Ms. Flores' shoulder that appear to jostle Ms. Flores. Ms. Trespalacios turns away from the table momentarily but soon reappears and momentarily addresses Ms. Flores while gesturing animatedly before folding her arms across her chest and inclining her body toward Ms. Flores with her head bent toward Ms. Flores' head. Although it is not entirely clear, Ms. Trespalacios' folded arms appear to touch or bump Ms. Flores' shoulder and to jog her slightly. The reactions of Ms. Vicente, Ms. Castillo, and Ms. Flores, if any, cannot be ascertained.

After she finished her lunch break, Ms. Flores told lead employee, Ms. Avila, that she had had a problem with Ms. Trespalacios. Ms. Avila reported the matter to Ms. Vega who took Ms. Flores to her office. Ms. Flores told Ms. Vega about the Trespalacios/Flores interaction, stating that Ms. Vicente and Ms. Castillo had also been present.

On the same day, July 9, Ms. Vega told Ms. Reilly that Ms. Trespalacios had pushed and abused Ms. Flores. Ms. Reilly told Ms. Vega to obtain written statements from witnesses to the incident. On Friday, July 10, Ms. Vega provided Ms. Reilly with written statements from herself, Ms. Avila, Ms. Flores, and Ms. Vicente, translating for her those written in Spanish. Ms. Flores' statement, in pertinent part read:

> Yesterday, on Thursday…during my lunch hour, I asked Xonia why she was upset with me, if it was because of the Union. And she told me that she didn't care, then she told me that she was gonna kick my ass out and throw me away, and she pushed me. And I am very upset for what she told me. I also told Xonia that it was my decision to vote in favor or against the Union. All I want is to work comfortably and to be left alone.

Ms. Vicente provided two statements[6] of the incident that read in pertinent part:

> Xonia approached Yolanda and Xonia touched her shoulder. And Yolanda said, she told her, "You're angry because I'm not in your Union." And Xonia said, "Aside from that, I am the same person here."
>
> Xonia approached Yolanda touching her on her shoulder. And Yolanda told her, "Are you angry because I don't support your Union?" And Xonia told her, "I am another person here. The Union is something else very apart from this."

Ms. Avila's statement, in pertinent part read:

> Yolanda Flores coming from the lunch room and told me that a lady from poultry had told her a bad word and had pushed her. I told her that it needed to be reported to the supervisor because we cannot say bad words to people. And I told her that [I] was going to communicate it to the supervisor, and I told Veronica [Vega].

[6] It is not clear how it happened that Ms. Vicente came to give two statements.

Ms. Vega's statement, in pertinent part read:

> Yesterday 7/9/09 @ 2:09 p.m. Flo Sotelo [Florinda Avila] and Yolanda Flores came to me in Sealing, telling me that at lunch time, Xonia Trespalacios pushed her and told her that when the Union comes in, she will be fired with a kick up her __s…Yolanda tells me she feels really uncomfortable with the things Xonia Trespalacios told her.

After reviewing the statements, Ms. Reilly did not direct anyone to interview and/or obtain a statement from either Ms. Trespalacios or Ms. Castillo, the other worker present during the Trespalacios/Flores interaction, and she did not, herself, interview any of the four witnesses to the interaction. Ms. Reilly acknowledged that she had not followed the company discipline policy in three particulars: (1) she did not obtain statements from all available witnesses to Ms. Trespalacios' alleged misconduct; (2) she did not obtain all facts relevant to Ms. Trespalacios' discipline; (3) she did not give Ms. Trespalacios an opportunity to explain her actions. Ms. Reilly further acknowledged that of the two eyewitnesses who gave statements, only Ms. Flores claimed that Ms. Trespalacios had threatened her. Ms. Reilly agreed that Ms. Vicente's statement did not corroborate that a threat or an assault had occurred.[7]

After reviewing the Vega/Flores/Vicente statements, Ms. Reilly viewed the camera footage of the incident, i.e. the footage contained in the Trespalacios/Flores CD, five to seven times. On the afternoon of July 10, based on her review of the statements and the camera footage, Ms. Reilly concluded that Ms. Trespalacios had committed an extremely serious, even violent, "assault" of Ms. Flores, and she decided to terminate Ms. Trespalacios. To Ms. Reilly's knowledge, it was the only assault of one worker on another since the Union had filed its petition for election.

On Saturday July 11, Ms. Reilly talked to labor consultant, Carlos Restrepo, about a presentation she planned to make to employees regarding the Trespalacios/Flores interaction, asking him to prepare a script for it in English and Spanish. Her intention was to play for employees the Trespalacios/Flores CD and to make it clear to them that employees could not carry on as they had been because employees were "just becoming a bit hot and heated, and [Ms. Reilly] wanted people to understand that [she] wanted people to work together, not against each other [because they] would be a better company if [they all] worked together."

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[7] Ms. Trespalacios testified about her interaction with Ms. Flores as follows: while Ms. Trespalacios was passing through the dining area, Ms. Vicente called her over to a breakroom table where Ms. Vicente sat with Ms. Flores and Ms. Castillo. Ms. Trespalacios spoke briefly to Ms. Vincente about nonunion matters. As they talked, Ms. Flores said to Ms. Trespalacios something to the effect that since Ms. Trespalacios was with the Union, Ms. Trespalacios was no longer talking to her. Ms. Trespalacios softly touched Ms. Flores' arm, assuring her, "With the Union or without, I continue to be the same." Saying no more, Ms. Trespalacios left. Ms. Trespalacios insisted that she touched Ms. Flores only once and never bumped her. She denied telling Ms. Flores the Union would have her kicked out or that she would lose her job when the Union came in. Ms. Vicente, who also testified, denied that Ms. Trespalacios had used any foul language or made any threats during the interaction. Ms. Flores' testimony, although more detailed than her written account, was essentially consistent with her statement.

I recognize that Ms. Trespalacios' version is not fully consistent with the camera footage. However, since Ms. Trespalacios' version of the Trespalacios/Flores interaction was neither obtained nor considered before Ms. Reilly decided to terminate her, the credibility of her version is irrelevant.

On Monday, July 13, Ms. Trespalacios was called into the training center to meet with Ms. Reilly and Helen Marquez, the factory manager. With Ms. Marquez translating, Ms. Reilly told Ms. Trespalacios that she was going to be dismissed because it had been reported to Ms. Reilly that Ms. Trespalacios had broken a company rule by assaulting someone. Ms. Trespalacios asked Ms. Reilly who the person was, but Ms. Reilly refused to give her any information, saying, "The interview is over. Can you please leave?" Ms. Trespalacios asked Ms. Reilly if she were being fired because she was supporting the Union, which Ms. Reilly denied.

On the same day, shortly after firing Ms. Trespalacios, Ms. Reilly assembled about 80 employees into the dining area. Ms. Reilly read to employees from the following script, as consultant Ms. Ceballos, utilizing the same script, translated:

> I called this meeting because I'm very concerned with something I've seen happening here lately as the union election gets closer.
>
> But before we talk about that let me say that this type of behavior has been going on since last year. In fact last year we had to terminate another employee for threats of physical harm against another employee who did not support the union.[8]
>
> Although the union claims that these types of actions do not occur, the truth is that they do and things are actually getting worse, allow me to show you. Here is a video of what happened here last Thursday. After you see it, I'll tell you more.

Ms. Reilly played the Trespalacios/Avila CD for the employees, projecting the footage on the dining area wall, and thereafter read aloud the following:

> The video clip is of an employee threatening, intimidating and physically assaulting another employee who used to be her friend because she changed her mind and decided to vote against the union.
>
> This is one example of the mistreatment some employees have shown their coworkers who disagree with them on the union question.
>
> I'm here to tell you that I won't tolerate that kind of behavior here in our plant.[9]

Ms. Reilly had never before shown any video of employee misconduct to assembled employees and had never before told assembled employees of another employee's termination.

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[8] The employee referred to was alleged as a discriminatee in the consolidated complaint issued pursuant to the 2008 ULP charges, which allegations were outstanding on July 13 and were later settled on September 28.

[9] Based on employee Maria Garcia's testimony that Ms. Reilly had a paper from which she read every time she spoke, as did Luz Ceballos in translating, I accept that Ms. Reilly did not deviate from the script in her remarks to employees.

C. Discussion of Alleged Unfair Labor Practices

1. Legal Principles

Section 7 of the Act provides that employees have the right to engage in union activities. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

An employer may lawfully impose some restrictions on employees' statutory rights to engage in union solicitation and distribution. Such restrictions, however, must be clearly limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in non-work areas. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Our Way, Inc., 268 NLRB 394 (1983).* The Board considers that an employer's maintenance of a work rule violates Section 8(a)(1) if employees would reasonably construe the language of the rule to restrict the exercise of Section 7 rights, applying a standard articulated in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646-647 (2004) and restated in *The NLS Group,* 352 NLRB 744-745 (2008):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

In termination cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that union activity was a motivating or substantial factor in an adverse employment action. The elements required to support such a showing are union activity by the employee, employer knowledge of that activity, and employer animus toward the activity. Direct evidence of union animus is not required; a discriminatory motive for adverse action may be inferred from circumstantial evidence and the record as a whole. *Verizon and Its Subsidiary Telesector Resources Group*, 350 NLRB 542, 548 (2007); *Tubular Corporation of America,* 337 NLRB 99 (2001). If the General Counsel meets the initial burden, the burden of proof then shifts to the Respondent to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Alton H. Piester, LLC,* 353 NLRB No. 33 (2008).

2. Independent Alleged Violations of Section 8(a)(1) of the Act

a. Maintenance of Work Rules

The General Counsel contends that the Respondent violated Section 8(a)(l) of the Act by maintaining the following work rules:

Rules 11 and 12. Rules 11 and 12 respectively prohibit employees from leaving their department or the plant during a working shift without a supervisor's permission, and stopping work before shift ends or taking unauthorized breaks. Citing *Crowne Plaza Hotel*,[10] the General Counsel argues that employees could reasonably read Rules 11 and 12 to require consultation with supervision before engaging in a protected work stoppage on penalty of discipline.

The Respondent points out that Rules 11 and 12 address legitimate business concerns and do not expressly or implicitly prohibit protected activity and argues that no evidence exists that the rules have been applied so as to restrain or chill employees in exercising their Section 7 rights or that any employee interpreted them to prohibit protected activities. The Respondent cites *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998) (mere maintenance of certain rules does not chill employees' Section 7 rights). The rules considered in *Lafayette Park Hotel* do not parallel those at issue herein. The Board in *Crowne Plaza Hotel*, on the other hand, held that rules prohibiting employees from "leaving [their] work area without authorization before the completion of [their] shift [and/or] walking off the job" were unlawfully overbroad because "an employee would reasonably read those rules as, respectively, requiring management's permission before engaging in such protected concerted activity, thereby allowing management to abrogate the Section 7 right to engage in such activity…or altogether prohibiting employees from exercising their Section 7 right to engage in such protected concerted activities."[11] See also *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000) (invalidating, as overbroad, a rule that "[e]mployees who walk off the job will be discharged"). Accordingly, I find Rules 11 and 12 violate Section 8(a)(1) of the Act as impermissibly overbroad.

Rule 28. Rule 28 prohibits the unauthorized soliciting of contributions on [the Respondent's] premises. Citing *Our Way, Inc.,* 268 NLRB 394 (1983) and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the General Counsel argues that rules barring solicitation on employees' own time are presumptively invalid. Without citing any authority for its position, the Respondent contends the prohibition of "contribution" solicitation cannot have a chilling effect on Section 7 rights. Although not clearly explicated, the Respondent's position appears to be that the language of Rule 28, restricted as it is to solicitation of "donations," cannot be construed to encompass any protected activity. While barring solicitation of donations may not explicitly restrict activity protected by Section 7, I cannot find the word "donations" to be so intrinsically limited as to prevent employees from reasonably construing the language to prohibit protected solicitations and thus to chill protected activity.[12] See *Lutheran Heritage Village-Livonia*, at 646. Since any ambiguity in the Respondent's rules must be construed against it as the promulgator of the rules,[13] I find Rule 28 to be overbroad and violative of Section 8(a)(1) of the Act

Rule 33. Rule 33 prohibits distributing printed matter on [Respondent's] premises without permission. This rule unqualifiedly bars literature distribution at any time on the Respondent's premises, which must necessarily include distribution of protected material on nonworking time and in nonworking areas. It is thus presumptively invalid. See *Hale Nani Rehabilitation & Nursing*, 326 NLRB 335 (1998); *Stoddard-Quirk Mfg. Co.*, 38 NLRB 615, 621 (1962).

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[10] 352 NLRB 382, 386-387 (2009) (rules that prohibit "walking off the job" and "leaving your work area without authorization before the completion of your shift" are unlawful)

[11] *Crowne Plaza Hotel* at 386-387.

[12] Among other potentially overbroad applications of the rule, it would prohibit solicitation of a financial donation to defray printing costs of protected literature.

[13] *Lafayette Park Hotel*, at 828.

Rule 35. Rule 35 prohibits inability or unwillingness to work harmoniously with other employees. The adjuration to "work harmoniously" is so imprecise as to encompass any disagreement or conflict among employees, including those related to protected discourse and/or interaction. Since employees could reasonably construe the language of the rule to prohibit Section 7 activity, it is overbroad and violates Section 8(a)(1) of the Act. See *Lutheran Heritage Village-Livonia*, at 646.

b. Maintenance of Mandatory Arbitration Agreement

As a condition of employment, the Respondent requires its employees to agree to submit all employment disputes and claims to binding arbitration, "including claims of wrongful discharge, discrimination, harassment, or any injury to…physical, mental or economic interests."

The General Counsel contends that the Respondent's involuntary arbitration provision precludes employees from seeking redress with the Board, which reasonably tends to inhibit employees from invoking their right to raise employment-related complaints under the provisions of the Act and violates Section 8(a)(1) of the Act.

The Respondent disagrees, arguing that as the provision does not explicitly restrict employees from resorting to the Board's remedial procedures, employees would not reasonably believe they are precluded from filing unfair labor charges with the Board. The Respondent further argues that absence of evidence of intent to interfere with employee access to the Board and/or of implementation prevents a finding of violation.

Applying an objective standard, the Board has found that even if a mandatory arbitration policy does not explicitly restrict employees from resorting to the Board's remedial procedures, the inquiry must be whether its language "would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board." *U-Haul Company of California*, 347 NLRB 375, 377 (2006). Here, employees would reasonably understand the arbitration policy to require employees to utilize the Respondent's arbitration procedures instead of filing charges with the Board. Accordingly, the policy violates Section 8(a)(1) of the Act.

3. Discharge of Xonia Trespalacios

No party disputes that the General Counsel has met the first two elements of the *Wright Line* burden as to the discharge of Ms. Trespalacios. Uncontroverted evidence shows that Ms. Trespalacios engaged in union activities of which the Respondent was aware. As to the third element—the existence of employer animus toward Ms. Trespalacios' union activities or to employee union support generally—there is no direct evidence. Any finding that the Respondent had a discriminatory motive in discharging Ms. Trespalacios must be inferred from circumstantial evidence and the record as a whole.

Consideration of the circumstantial evidence starts with the Trespalacios/Flores CD and necessitates a determination as to what inferences may be drawn from the recorded footage. After carefully reviewing the Trespalacios/Flores CD, I find that the most tenable inference to be drawn is that Ms. Trespalacios innocuously patted and nudged Ms. Flores' shoulder as the two women spoke and later bent toward Ms. Flores with folded arms to whisper in her ear, jogging her shoulder inadvertently in the process. Viewed in a light most favorable to the Respondent, the Trespalacios/Flores footage is, at best, susceptible to two interpretations, an innocent as well as a culpable one. Therefore, the camera footage alone cannot justify a conclusion that Ms. Trespalacios hostilely pushed Ms. Flores' shoulder as they spoke and later vindictively bumped her with folded arms. Since the Respondent could not have unequivocally determined

the tenor of the Trespalacios/Flores interchange solely by viewing the Trespalacios/Flores CD, it follows that the Respondent would have had to examine fully the circumstances surrounding the interchange in order to ascertain fairly and impartially whether Ms. Trespalacios had engaged in misconduct.

The course of action the Respondent took was the antithesis of a full examination of the circumstances surrounding the Trespalacios/Flores interchange. Ms. Reilly failed to follow established, written company policies in investigating the alleged misconduct of Ms. Trespalacios; she did not attempt to obtain accounts from all witnesses to the incident; she made no attempt to obtain Ms. Trespalacios' version of events, although company policy dictated that "[e]mployees should always be given an opportunity to explain their actions," and she took no steps to ascertain whether Ms. Trespalacios had been given notice of the consequences of her alleged behavior. Finally, Ms. Reilly did not consider all available evidence to evaluate, as policy prescribed, whether the alleged conduct was "a major or minor problem, an isolated incident, or a recurring problem."

Even apart from Ms. Reilly's unexplained failure to follow company disciplinary policy, her investigation of Ms. Flores' complaint against Ms. Trespalacios was plainly inadequate by any standard: she failed to gather information from all witnesses to the incident; she failed to look into Ms. Trespalacios employment record; she rejected, without plausible explanation, Ms. Vicente's eyewitness account, which contradicted in material part Ms. Flores' accusations, and, without any articulated or apparent need for haste, she precipitately resolved to terminate Ms. Trespalacios. The investigation deficits and disciplinary haste strongly suggest animus.[14]

Ms. Reilly's post-termination conduct may also be considered in determining animus. On the same day that she discharged Ms. Trespalacios, Ms. Reilly assembled employees and played for them the Trespalacios/Flores footage, asserting that the CD showed an employee threatening, intimidating and physically assaulting another employee because she had decided to vote against the Union. Although Ms. Reilly admitted she knew of no employee violence toward union nonsupporters since the election petition had been filed, she nevertheless told the assembled workforce that threats of physical harm against nonsupporters was worsening. Her stated aim of making employees understand they should work together, not against each other, reveals an antipathy for employee discord that goes beyond reasonable workplace concerns and encompasses the robust, vigorous, and protected employee interactions that are common during union campaigns. Ms. Reilly did not assure employees that the Respondent would respect the rights of employees to campaign enthusiastically for the Union but only emphasized that she would not "tolerate" the "mistreatment some employees

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[14] See *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (employer failure to follow progressive discipline system evidence of unlawful motivation); *Embassy Vacation Resorts*, 340 NLRB 846, 848-849 (2003) (animus shown by employer's failure to give employees a chance to defend themselves and its deviation from its past practice of discipline); *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn. 1 (2003) (employer failed to follow its progressive discipline policy); *Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007) (limited investigation into alleged misconduct without giving employees an opportunity to explain allegations against them supports a conclusion that the discharges were discriminatorily motivated); *Midnight Rose Hotel*, 343 NLRB 1003,1005 (2004) (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct);*Toll Mfg. Co.,* supra (precipitous discharge persuasive evidence of unlawful intent).

had shown their coworkers who disagreed with them on the union question."[15] Her stated aim and her warning reveal animus toward vigorously expressed union support. Finally, since the Trespalacios/Flores footage recorded, at most, ambiguous behavior, its presentation as an example of conduct that could provoke termination also reveals animus toward forceful but protected union activity.[16]

The Respondent's above-described omissions and commissions require an inference that the Respondent had a discriminatory motive in discharging Ms. Trespalacios. Ms. Reilly's poorly investigated and otherwise-inexplicable assessment of Ms. Trespalacios' alleged misconduct and her utilization of Ms. Trespalacios' discharge in unwarrantedly cautioning employees against "mistreatment" of those who differed on the union issue evidence animus toward Ms. Trespalacios' union activity and toward employee union support generally.[17] The General Counsel having met the initial *Wright Line* burden, the burden shifts to the Respondent to establish persuasively by a preponderance[18] of the evidence that it would have discharged Ms. Trespalacios even in the absence of her union activities or the union activities of employees generally.

In order to meet its shifted *Wright Line* burden, the Respondent "must show that it had a reasonable belief that [Ms. Trespalacios] committed the offense, and that it acted on that belief when it discharged [her]." *McKesson Drug Co.,* 337 NLRB 935, 936-937 and fn. 7 (2002). After careful consideration of the evidence, for the reasons detailed above, I find Ms. Reilly did not have a reasonable belief that Ms. Trespalacios had committed an offense that merited termination. The Respondent has neither justified Ms. Reilly's digression from prior practice and policy nor vindicated Ms. Reilly's extraordinary post-discharge employee presentation to employees. The only rational explanation is that the Respondent was motivated in both instances by a desire to quell employee union support and generally to impede the union organizational drive. The Respondent has not met its shifted burden under *Wright Line;* accordingly, I find the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ms. Trespalacios on July 13.

VI. Representation Case: Findings of Fact and Discussion

A. Objections to the Election

The Board does not lightly set aside representation elections. *Quest International,* 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). "There is a strong presumption that ballots

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[15] See *Champion Home Builders Co.,* 350 NLRB 788, 789 (2007) (employer's speech to employees lawful where it "explicitly affirmed that [the employer] would respect the right of employees to solicit (and even argue) for the Union.")

[16] The absence of an 8(a)(1) allegation regarding Ms. Reilly's presentation does not prevent me from considering it as evidence of animus.

[17] Even assuming Ms. Trespalacios was the unfortunate casualty of the Respondent's animus toward union activities generally rather than animus toward her activities specifically, the General Counsel has established the necessary animus element.

[18] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, supra, 941 F.2d at 328, and the burden of proving a Board-supervised election should be set aside is a "heavy one." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974). The objecting party must show that objectionable conduct affected employees in the voting unit. *Avante at Boca Raton, Inc.,* 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence unit employees knew of alleged coercive incident).

As the objecting party, the Petitioner has the burden of proving interference with the election. See *Jensen Pre-Cast,* 290 NLRB 547 (1988). The test, applied objectively, is whether the employer's conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division,* 336 NLRB 157, 158 (2001); *Baja's Place*, 268 NLRB 868 (1984).

On July 24, the Petitioner filed 53 timely objections to employer conduct affecting the results of the election. Either prior to or in the course of the hearing, the Petitioner withdrew all objections except for objections 2, 4, 12, 13,14,15,16, 17, 22, 25, 29, 31, 33, 34, 35, 37, 39, 40, 43, 45, 46, 47, 49, 50, 51, and 53, which are before me for consideration. Where objections relate to the same sequence of events, I have considered them together.

Objection 2

> Employer, by its agents, intimidated eligible voters with loss of employment opportunities if they supported the Union.

The Petitioner does not address this objection in its post-hearing brief. However, the evidence adduced in support of the objection is as follows: (1) After the Petitioner distributed consumer boycott flyers at facilities of Fresh & Easy food stores (F&E), the Employer's sole customer, the Employer distributed campaign flyers stating, "An Attack on Fresh & Easy is an Attack on 2 Sisters" and "Don't Let the UFCW Make Us Fail." (2) Consultant Mr. Rivera showed employees a document describing how a company in Arizona had gone bankrupt because of a union, telling them they had the right to vote yes or no and they should think over whether they wanted the union.

Under Section 8(c) of the Act employers may express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefits. *NLRB V. Gissel Packing Co.*, 395 U.S. 575 (1969); *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006). Even "intemperate" personal opinions are protected by the free speech provisions of Section 8(c). *International Baking Co.*, 348 NLRB 1133 (2006); *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). An employer may explain its perception of the advantages and disadvantages of collective bargaining to its employees as long as there are no threats or promises of benefits. *Amersino Marketing Group LLC*, 351 NLRB 1055(2007); *Langdale Forest Products Co.*, 335 NLRB 602 (2001). The Board also permits the employer to distribute antiunion materials, as long as there is no coercion. *In Re Allegheny Ludlem Corp.*, 333 NLRB 734 (2001). Since there is no showing that the Respondent overstepped its speech rights under Section 8(c), I recommend that Objection 2 be overruled.

Objections 4 and 37

Objection 4: Employer, by its agents, interfered with the rights of employees by singling out known Union adherents and publically insulting them.

Objection 37: The Employer fired a known Union supporter on or about July 13 and made an example out of her by escorting her out of the plant with a guard. The Employer then showed a video to captive audience meetings using her as an example. This coerced employees.

The evidence relating to Objections 4 and 37 has been set forth above in the statement of facts as to the discharge of Ms. Trespalacios and the presentation of the Trespalacios/Flores CD to assembled employees. I have found the Respondent unlawfully discharged Ms. Trespalacios. Such unlawful conduct is "a fortiori, conduct which interferes with the results of an election." See *Airstream, Inc.,* 304 NLRB 151, 152 (1991). Further, Ms. Reilly's statements in her July 13 meeting with employees would reasonably have the effect of discouraging employees' protected activities and her threat to discipline workers for "mistreatment" of those with differing union views was so vague as to chill protected, albeit vigorous, activity. See *Tawas Industries,* 336 NLRB 318, 322 (2001)(employer statements that employees who harass or pressure other employees in the course of union solicitations should be reported to management, who will discipline the offending individuals, discourage employees from engaging in protected activity). Accordingly, I recommend that Objection 4 and 37 be sustained.

Objections 12, 45, and 50

Objection 12: Employer, by its agents, questioned and polled employees regarding their support for the Union during the pre-election period.

Objection 45: The Employer passed out free T-shirts and hats to employees in a manner as to engage in interrogation of the employees as to their sentiments for or against the Union.

Objection 50: The Employer asked voters how they voted and if they voted.

The Employer made available to employees tee shirts and beanies imprinted only with the Respondent's name and logo. Laura, a laundry room employee who gives out clean smocks and gear to workers, handed out the tee shirts and beanies to any interested employee at the laundry room distribution counter. Later, Laura went to the employee cafeteria and proffered free tee shirts and beanies to employees there. Although an employee rush to obtain the free items caused some congestion and confusion at the laundry counter, there is no evidence that, along with the handouts, the Respondent disseminated any coercive communications or any information at all about the Union or the election. Accordingly, I recommend that Objections 12, 45, and 50 be overruled

Objections 13 and 35

Objection 13: Employer, by its agents, imposed a discriminatory non-solicitation and/or discriminatory no-distribution rule on employees in a manner designed to interfere with the conduct of a fair election.

> Objection 35: The Employer maintained and enforced illegal rules restricting section 7 activities of employees.

Objections 13 and 35 are substantially coextensive with allegations of the complaint, and evidence relating to both the objections and the complaint allegations has been set forth above in the statement of facts regarding relevant company work rules and policies.

Although I have found that the Employer maintained overbroad and unlawful workplace rules, it is not axiomatic that such conduct warrants setting aside an election; rather, the Board looks to all facts and circumstances to determine whether the employment atmosphere was so tainted as to warrant setting aside the election. *Delta Brands, Inc.,* 344 NLRB 252, 253 (2005). There is no evidence the Employer implemented or enforced the overbroad rules at any time during the critical period or that employees' union activities were in any way affected by them. The evidence shows that employees engaged in open pro-union activity at the facility during the entire election campaign and filed unfair labor practice charges. Since there is no showing that the mere existence of the rules could have affected the results of the election, I recommend that Objections 13 and 35 be overruled.

Objection 14

> Objection 14: Employer, by its agents, denied employees access to their Union representatives during the period preceding the conduct of the NLRB election.

The Union presented no evidence in support of Objection 14. Accordingly, I recommend that Objection14 be overruled.

Objection 22

> Objection 22: The Employer, by its agents, interfered with the free choice of employees (by) threatening to have a Union representative arrested in the presence of employees, interfering with the laboratory conditions necessary for the conduct of a fair election.

The evidence relating to Objection 22 consists of testimony that when union agent Joe Duffle arrived at the facility in the evening for the post-election vote count, an officer of the Moreno Valley Police Department told him he needed to leave the property or face incarceration. The Union did not address this objection in its post-hearing brief, and I find no basis on which to find that a police officer's post-election threat to a union agent interfered with the free election choice of any voter. Accordingly, I recommend that Objection 22 be overruled.

Objection 33 and 47

> Objection 33: The Employer interfered with the voting rights of six employees who were forced to wait outside the plant for up to an hour, escorted through the plant by management and security thugs and then escorted out all serving to intimidate them and other employees.

> Objection 47: The Employer, by its attorney, tried to prevent employees from voting by closing the gate to employees arriving before the polls closed. This intimidated the workers who observed this although the one worker who showed up was eventually allowed to enter the premises and vote. This is also direct persuader activity and Seyfarth Shaw should be required to file its LM-20.

On election day, off-duty employees seeking to vote entered the facility through the Respondent's entrance gate. The name of one woman who appeared to vote had inadvertently been omitted from the Excelsior List, and her admission was delayed for 30 minutes. Because she was on medical leave from the Respondent's Corona facility and was unfamiliar with the facility, Ms. Reilly accompanied her to the entrance to the voting area. Former employees, Perla Sosa, Soccoro Serrano, and Laura Salcedo, alleged discriminatees in the 2008 ULP charges, were delayed for about 30 minutes at the entrance gate until escorted by an office employee to the voting area and permitted to vote challenged ballots. Two individuals arrived at the facility entrance apparently shortly before the polls closed. One used an electronic employee gate pass to enter the facility. The other, Javier Castro, who was not named on the Excelsior list, was delayed at the gate. Both were ultimately allowed to vote. No evidence was presented from which I can infer that any of the delays interfered with any employee's free choice in the election. Accordingly, I recommend that Objection 22 be overruled.

Objections 39

> Objection 39: The Employer refused to allow representatives of the Petitioner on the premises to attend a pre-election conference, interfered with the right of one Union observer to participate as an observer and refused to allow Union representatives on the property to attend the vote count.

The Union did not address this objection in its post-hearing brief, but evidence relating to Objection 39 consists of the following: (1) although union representatives attended a pre-election conference conducted by the Region, the Respondent limited their number; (2) employee Pablo Andreas, prospective union observer, arrived at the facility gate, telling a guard that he was to be an election observer but that he was 30 minutes late. When asked to wait, he waited for 15 minutes and then went to the parking lot; (3) the same facts as set forth under Objection 22.

None of the evidence adduced in support of Objection 39 permits an inference that any of the alleged conduct interfered with the free election choice of any employee or precluded a fair election. Accordingly, I recommend that Objection 39 be overruled.

Objections 15, 16, 34, and 43

> Objection 15: Employer, by its agents, including third party agents, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election.
>
> Objection 16: Employer, by its agents, and by third parties, created an atmosphere of fear, intimidation and coercion which made impossible the holding of a fair election.
>
> Objection 34: The Employer hired extra security guards during the campaign and on the election day in order to intimidate employees.

> Objection 43: The Employer created an atmosphere of coercion by having three Moreno Valley police stationed at the plant on election day. This along with the increased security thugs caused an atmosphere of intimidation.

During a union demonstration conducted by the Union in May, 40-50 demonstrators, over the objections of Respondent's managers and security officers, entered the Respondent's premises.[19] Although management repeatedly advised the demonstrators they were trespassing and asked them to leave, the demonstrators raucously refused to leave the building, demanding that the Respondent recognize the Union and shouting for Ms. Reilly to appear. The demonstrators remained in the Respondent's facility until ousted by law enforcement.

On the day of the election, the Respondent increased security officers from one to six, positioning guards at the gates and parking area of the property, a not unwarranted precaution in light of the May demonstration. In response to a rumor that a large group of demonstrators was approaching the facility, the Respondent requested law enforcement presence, and Sheriff's Department officers appeared briefly at the facility with one unit staying 20 to 25 minutes. There is no evidence the officers interacted with voters or interjected themselves into election issues.

The objecting party must show the conduct in question had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. *Quest International,* 338 NLRB 856, 857 (2003). Since neither the security guards nor law enforcement personnel engaged in any coercive or even questionable conduct towards employees, I cannot find that the Respondent's implementation of security measures on the day of the election had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. Accordingly, I recommend objections 15, 16, 34, and 43 be overruled.

Objections 17 and 40

> Objection 17: The Employer, by its agents, made captive audience speeches to employees within 24 hours before the scheduled time of the Board conducted election.
>
> Objection 40: The Employer engaged in a captive audience meeting within 24 hours of the election by having numerous on-on-one meetings where the same script was read to employees effectively constituting a captive audience meeting.

As to Objection 17, the Union has proffered no evidence of any formal captive audience meeting held by the Respondent within 24-hours of the election. The objection appears relate to the July 13 meeting, detailed above, in which Ms. Reilly played the Trespalacios/Avila CD for employees. Pointing out the coercive character of the July 13 meeting, the Union argues that "the Board should use this opportunity to prohibit captive audience meetings by the employer during the critical period." The Union correctly "recognize[s] this Judge will not overrule… current Board precedent" and proposes to reserve meaningful discussion for the appellate process. As the Union acknowledges, the objections hearing is not the appropriate forum in which to seek reversal of Board precedent; accordingly I recommend objection 17 be overruled.

[19] The Respondent provided video evidence of the demonstration.

As to Objection 40, the Union argues that interaction among the Respondent's consultants and various employees on the day of the election was tantamount to captive audience meetings. On the day of the election, consultant Mr. Rivera spoke to various employees in the locker room, in the employee cafeteria during employees' break or lunch times, and in the designated smoking area. The Board has said that the 24-hour rule enunciated in *Peerless Plywood,* 107 NLRB 427, 429 (1953) "was not intended to, nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." *Business Aviation, Inc.*, 202 NLRB 1025 (1973). The Board has also held that the rule does not prohibit employers and unions from making campaign speeches during the 24-hour period "if employee attendance is voluntary and on the employees' own time." *Peerless Plywood Co*., supra at 430; see also *Foxwoods Resort Casino,* 352 NLRB 771, 771 and 780-81 (2008).

Although employees may have been personally disinclined to leave the locker room, cafeteria, or smoking area when the Respondent's consultant spoke to them, they cannot by any stretch of logic have been considered "captive." As the Union has presented no evidence to show that the Respondent made speeches to a captive assembly of employees within 24 hours of the election, I recommend that Objection 40 be overruled.

Objection 25

> The Employer, by its agents, engaging in campaigning at the polling places and in the line to the polling place by the NLRB conducted election.

The Union contends that because campaign posters urging employees to vote against the Union were affixed to facility walls in proximity to the immediate voting area and along the anticipated route to the voting area, election laboratory conditions were violated.[20] There is no evidence the posters were affixed on the day of the election, rather it appears the posters had been displayed for some time. The following employees, Pablo Andreas, Maria Garcia, Antonio Quintero, and Zeferino Arzate testified, variously, that on the day of the election the Vote-No posters could be seen in the changing room and the production office, at the plant entrance, in the cafeteria, next to the Human Resources office, at the back door, by the production office, and near the production rooms. Employees had to pass some of the posters enroute to the voting area. There is no evidence the posters were visible to voters waiting in line to vote.

In considering objections of impermissible electioneering, the Board determines whether the conduct, under the circumstances, warrants an inference that it interfered with the free choice of the voters by assessing the following factors: whether the conduct occurred within or near the polling place, whether the conduct occurred within a designated "no electioneering" area, the extent and nature of the alleged electioneering, whether it was conducted by a party to the election or by employees, and whether it is contrary to the instructions of the Board agent. *Boston Insulated Wire & Cable Co*., 259 NLRB 1118, 1119 (1982).

Under the circumstances of this case, the evidence is insufficient to warrant an inference that the existence of Vote-No posters interfered with the exercise of the employees' free choice. There is no evidence the posters could be seen by employees waiting in line to vote; they were not displayed in any no-electioneering area, and their placement did not violate any instructions by the Board agent. The posters were apparently *in situ* during much of the pre-election period; no particular attention was drawn to them on the day of the election, and there is no reason to

[20] The Union raises no objection to the content of the posters but only to their placement.

infer that their continued presence, without more, rose to the level of impermissible electioneering. Accordingly, I recommend that Objection 25 be overruled.

Objections 29, 31, and 49

> Objection 29: The Employer, by its agents, discriminated against employees in violation of Sections 8(a)(1) and (3) by terminating them because of their union and/or protected concerted activities.

Insofar as Objection 29 relates to the discharge of Sonia Trespalacios, that issue has been dealt with under Objections 4 and 37 and need not be reconsidered under Objection 29. No evidence as to any other discriminatory discharge was received.

> Objection 31: The Employer fired four Union supporters during the pre-petition period. Those unlawful discharges have not been remedied.
>
> Objection 49: The Employer committed numerous violations of the Act which are the subject of the Complaint in Case 21-CA-38480 and 38563. Those unfair labor practices are unremedied and the failure to remedy them interferes with laboratory conditions.

Objections 31 and 49 relate to the unfair labor practice allegations stemming from the 2008 ULP charges. As noted earlier, following several days of hearing on the cases, an administrative law judge approved the parties' settlement agreement of the complaint allegations on September 28. Compliance on the settlement agreement thereafter closed. I have declined to receive the hearing transcripts/exhibits and settlement agreement in these cases as evidence of wrongdoing. Accordingly, I recommend that Objections 31 and 49 be overruled.

Objection 46

> The Employer asked employees not to wear items supporting the Union.

The Union provided no evidence in support of this objection. Accordingly, I recommend objection 46 be overruled.

Objection 51

> The Union was not allowed at the pre-election conference to tour enough of the facility in order to insure that the voting areas would be secure from campaigning and that there would be free access to voting without intimidation and coercion from the Employer.

The Union did not address this objection in its post-hearing brief, but the evidence relating to Objection 51 is essentially that during the pre-election conference, the Respondent refused to accommodate a union representative's request to tour employees' pathways from work areas to the voting room. There being no basis for inferring that the Respondent's denial of this request would interfere with employees' free choice in the election, I recommend objection 51 be overruled.

Objection 53

The Employer, through its agents, unlawfully recorded employees, thus intimidating and coercing them.

At the time of the election, the Respondent operated 30 security cameras in the plant, all of which recorded in "real time" mode and which surveyed the Respondent's entire operations. On the day of the election the two cameras in the immediate vicinity of the voting area were conspicuously covered with cardboard boxes. The remaining 28 cameras were operative throughout the election day as usual. Camera footage from the remaining cameras was viewable in the security-guard and Ms. Reilly's offices. Although each employee would normally have to pass by four or five operating cameras on his/her way to the voting area, no camera was positioned to track employees' final passage into the voting area.

The Union contends that by viewing election-day camera footage, the Respondent could determine with reasonable accuracy who was and who was not voting by tracking employees' treks from work areas to the voting area. Such information could allow the Respondent to "encourage employees to vote whom the employer believes to be employer sympathizers" and to allow the Respondent to "coerce employees because they know that they are being watched whether they decide to vote or not vote." There is no evidence the Respondent encouraged any employee to vote or had any knowledge of whether individual employees had or had not voted.

The Board "recognize[s] that an employer has the right to maintain security measures necessary to the furtherance of legitimate business interests during the course of union activity." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 501 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). The Board also finds it "neither unlawful nor objectionable when a…security camera, operating in its customary manner, happens to record protected concerted activity on videotape." *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001). There being no evidence that the Respondent's security cameras in use on election day operated in other than their customary manner, I recommend objection 53 be overruled.

Alleged Conduct Not Included in the Union's Objections

In its post-hearing brief, the Union has alleged that Board agent misconduct interfered with the election, arguing that a Board agent's pre-election-day tour of the facility constituted secretive and serious misconduct warranting a new election. The Union has raised an issue "not reasonably encompassed within the scope of the objections that the Regional Director set for hearing." See *Precision Products*, 319 NLRB 640, 641 (1995). A party affected by objections to an election is denied procedural due process if the fundamental requirements of "meaningful notice ... and ... full and fair opportunity to litigate" are not provided. *Factor Sales, Inc,* 347 NLRB 747 (2006). To be "meaningful, the notice must provide a party with a "clear statement" of the accusation against it, as a party "cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion International Corp.*, 339 NLRB 672, 673 (2003). Inasmuch as the Union's allegations in this regard constitute an untimely objection, they are not considered.

VII. CONCLUSIONS AS TO THE UNION'S OBJECTIONS

Inasmuch as I have recommended that Objections 4 and 37 be sustained, I recommend that the election held on July 17, 2009 in Case No. 21-RC-21137 be set aside and that the representation proceeding be remanded to the Regional Director of Region 21 for the purpose of conducting a second election.

Further, in accordance with *Lufkin Rule Co.*, 147 NLRB 241 (1964) and *Fieldcrest Cannon, Inc.,* 327 NLRB 109 FN 3 (1998), I recommend that the following notice be issued in the Notice of Second Election in Case No. 21-RC-21137:

NOTICE TO ALL VOTERS

The election conducted on July 17, 2009 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice among employees in the following unit:

> All full-time and regular part-time production employees, maintenance employees, technical/quality assurance employees, sanitation employees, shipping and receiving employees and plant clerical employees employed by the Employer at its Riverside facility, excluding all other employees, temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.[21]

VIII. CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining overbroad work rules and by promulgating and maintaining a mandatory arbitration rule that required employees to waive their right to file charges with the Board.
4. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Xonia Trespalacios because she engaged in union or other concerted, protected activities and to discourage employees from engaging in these activities.
5. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section 2(6) and (7) of the Act.
6. By the conduct described in Objections 4 and 37, which conduct occurred during the critical election period, the Respondent has interfered with the holding of a fair election; the conduct warrants setting aside the election in Case No. 21-RC-21137 that was conducted on July 17, 2009.

Remedy

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[21] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by [date].

The Respondent having unlawfully terminated employee Xonia Trespalacios, it must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the dates of her discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will be ordered to make appropriate emendations to Xonia Trespalacios' personnel files. The Respondent will be ordered to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

Respondent, 2 Sisters Food Group, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining overbroad work rules and a mandatory arbitration rule that requires employees to waive their rights to file charges with the Board
(b) Terminating any employee for engaging in union activities and/or to discourage employees from engaging in union activities.
(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

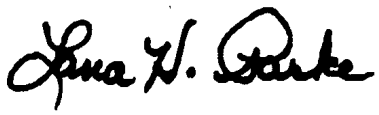
(a) Within 14 days from the date of this Order, offer employee Xonia Trespalacios full reinstatement to her former jobs or, if that job no longer exists, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.
(b) Make employee Xonia Trespalacios whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.
(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Xonia Trespalacios and within 3 days thereafter notify her in writing that this has been done and that the termination will not be used against her in any way.
(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facilities in Riverside, California copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 13, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: June 10, 2010



Lana H. Parke
Administrative Law Judge

[23] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT have any work rules that interfere with your right to engage in union or other protected, concerted activities or to file charges with the National Labor Relations Board.
WE WILL NOT discharge any employee for supporting the United Food and Commercial Workers International Union, Local 1167 (the Union) or any other union and/or to discourage employees from engaging in union or other protected, concerted activities.
WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights stated above.

WE WILL rescind all work rules that interfere with your right to engage in union or other protected, concerted activities or to file charges with the National Labor Relations Board.
WE WILL offer Xonia Trespalacios full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or to any other rights or privileges previously enjoyed.
WE WILL make Xonia Trespalacios whole for any loss of earnings and other benefits suffered as a result of our unlawful discharge.
WE WILL remove from our files any reference to the unlawful discharge of Xonia Trespalacios and notify her in writing that this has been done and that the discharge will not be used against her in any way.

2 SISTERS FOOD GROUP, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor
Los Angeles, California 90017-5449
Hours: 8:30 a.m. to 5 p.m.
213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.